A

Dewi Nadia bt Alias v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–148–05 OF 2013
MOHTARUDIN BAKI, TENGKU MAIMUN AND ABDUL RAHMAN SEBLI JJCA
10 MARCH 2015

C

Criminal Procedure — Appeal — Appeal against conviction and sentence — Offence of murder — Death caused by blunt force trauma to chest and abdomen of deceased consistent with child battery or abuse — Whether evidence adduced sufficient to establish child battery or abuse — Whether there was anyone else who had access to deceased — Whether conviction and sentence based on circumstantial evidence safe — Whether corroborated — Penal Code, s 302

D

In the High Court, the appellant was originally charged with her husband ('SP12') for the murder of her stepdaughter. However, the charge against SP12 was withdrawn and the trial proceeded only against the appellant. The evidence of the deceased's sister ('SP13') disclosed that the deceased had drowned and the appellant's neighbour ('SP8') stated that when he tried to resuscitate the deceased by pressing her chest, water came out from the deceased's nose and mouth. However, the pathologist ruled out drowning as the cause of death and from the post-mortem concluded the cause of death to be blunt force trauma to the chest and abdomen which was consistent with child battered syndrome or child abuse. In addition to that, 77 marks of injury on the body of the deceased, all of which were caused by blunt force trauma. At the end of the defence case, the appellant was found guilty and convicted for an offence under s 302 of the Penal Code. Hence, the present appeal. The primary issue that arose for the court's determination in this appeal were whether the JC was correct in convicting the appellant for murder based on the circumstances alluded to in the grounds of judgment.

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Held, allowing the appeal; acquitting and discharging the appellant:

(1) If the deceased was physically abused and the injuries were sustained between 15–24 hours prior to her death, then it was incumbent for the judicial commissioner ('the JC') to exclude any other adult who had access to the deceased during that period of time, before concluding that nobody else, except the appellant, could have inflicted the injuries on the deceased. The JC had failed to direct his mind to the fact that SP12 also had access to the deceased during the time that the injuries, as testified by SP5, were suffered by the deceased (see paras 27 & 29).

I

(2) There was no evidence from either SP8 or SP11 that they heard the deceased crying in the morning of the incident to infer that the appellant had inflicted the said injuries on the deceased at the material time, bearing in mind the presence of 77 injuries suffered by the deceased. Even if the appellant had uttered the words as testified by SP11, that piece of evidence was not sufficient to convict the appellant for the offence of murder as charged (see paras 30–31).

(3) The conviction of the appellant was not safe. The circumstances did not irresistibly point to the guilt of the appellant and the appellant alone and the combined strength of strands to make a rope was not strong enough to hang the appellant (see para 43).

(4) (per **Abdul Rahman Sebli JCA**, dissenting) In finding that it was the appellant who had caused the fatal chest and abdominal injuries, it was obvious that the JC relied on strands of circumstantial evidence. Taken individually, the strands of evidence were insufficient to tie the appellant with the death of the deceased but the united, force of all the circumstances put together irresistibly and unerringly point to the appellant as the person who had inflicted the fatal injuries, barring fanciful possibilities. That was the only reasonable inference that would account for all the proved facts. The JC was plainly right in coming to the conclusion that it was the appellant who caused the death of the deceased (see paras 79–81).

(5) (per **Abdul Rahman Sebli JCA**, dissenting) It was obvious that SP13 did not understand the nature of an oath. However, it was the precise situation contemplated by s 133A of the Act. The JC found her to be a competent witness, though not on oath after hearing further questions and answers to determine the level of SP13's intelligence. The unsworn testimony of SP13 must be corroborated in material particulars as provided by proviso to s 133A of the Act. The corroboration needed not be direct evidence that the appellant committed the offence. It was sufficient if it was merely circumstantial evidence of her connection with the crime. The crucial part of SP13's unsworn evidence was that while she and the deceased were in the bathroom, the appellant immersed the head of the deceased in a basin filled with water. This was corroborated by the evidence of SP8 that water came out from the mouth and nostrils of the deceased when he pressed her chest. There was also the evidence of the assistant medical officer that the deceased's hair was a bit wet when he attended to her. What SP13 told the court was therefore sufficient corroboration of the appellant's connection with the crime (see paras 86–89).

(6) (per **Abdul Rahman Sebli JCA**, dissenting) There was no possibility that it was SP12 who had inflicted the fatal injuries to the deceased's chest and abdomen as he was at his work place when the deceased succumbed to the

injuries. Based on the appellant's admission that SP12 loved his three children, especially the deceased, there was no reason for him to cause such life-ending injuries to the deceased (see paras 98–99).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, perayu asalnya dituduh bersama suaminya ('SP12') atas pembunuhan anak tirinya. Walau bagaimanapun, pertuduhan terhadap SP12 telah ditarik semula dan perbicaraan diteruskan hanya terhadap perayu. Keterangan kakak si mati ('SP13') menunjukkan bahawa si mati telah lemas dan jiran perayu (SP8) menyatakan apabila dia cuba untuk memulihkan semula si mati dengan menekan dadanya, air keluar daripada hidung dan mulut si mati. Walau bagaimanapun, ahli patalogi menolak lemas sebagai sebab kematian dan daripada bedah siasat menyimpulkan sebab kematian adalah trauma benda tumpul di dada dan abdomen yang mana konsisten dengan sindrom kanak-kanak yang didera atau penderaan kanak-kanak. Tambahan kepada itu, 77 tanda kecederaan pada badan si mati, kesemuanya yang disebabkan oleh trauma alat tumpul. Di akhir kes pembelaan, perayu didapati bersalah dan disabitkan atas kesalahan di bawah s 302 Kanun Keseksaan. Maka, rayuan ini. Isu awalan yang timbul untuk penentuan mahkamah dalam rayuan ini adalah sama ada pesuruhjaya kehakiman ('PK') adalah betul dalam menyabitkan perayu untuk pembunuhan berdasarkan keadaan yang dikemukakan dalam alasan penghakiman.

Diputuskan, membenarkan rayuan, membebaskan dan melepaskan perayu:

(1) Jika si mati didera secara fizikal dan kecederaan dialami antara 15–24 jam sebelum kematiannya, ia adalah tidak wajar bagi PK untuk meninggalkan mana-mana orang dewasa lain yang mempunyai akses kepada si mati sewaktu masa kejadian, sebelum menyimpulkan bahawa tiada orang lain, kecuali perayu, yang boleh menyebabkan kecederaan kepada si mati. PK gagal untuk mengarahkan mindanya kepada fakta bahawa SP12 juga mempunyai akses kepada si mati semasa kecederaan yang dialami oleh si mati terjadi, seperti yang dikemukakan oleh SP5 (lihat perenggan 27 & 29).

(2) Tiada keterangan daripada SP8 atau SP11 bahawa mereka mendengar si mati menangis pada pagi kejadian untuk menunjukkan bahawa perayu telah menyebabkan kecederaan tersebut ke atas si mati pada waktu material, dengan mengambil kira 77 kecederaan yang dialami oleh si mati. Jika pun perayu telah mengeluarkan perkataan sebagaimana keterangan oleh SP11, keterangan itu tidak mencukupi untuk menyabitkan perayu untuk kesalahan membunuh seperti pertuduhan (lihat perenggan 30–31).

(3) Sabitan perayu tidak selamat. Keadaan itu tidak cukup untuk menunjukkan kesalahan perayu dan perayu seorang diri dan kombinasi

rantaian keterangan tidak cukup kuat untuk menggantung perayu (lihat perenggan 43).

(4) (oleh **Abdul Rahman Sebli JCA**, menentang) Dalam dapatan bahawa ia adalah perayu yang telah menyebabkan kecederaan dada dan abdomen yang parah, adalah nyata bahawa PK bergantung kepada keterangan keadaan. Jika diambil secara individu, rantaian keterangan tidak mencukupi untuk mengaitkan perayu dengan kematian si mati tetapi jika disatukan, kekuatan kesemua keadaan diletak bersama tidak dapat dan tidak diragukan menunjuk ke arah perayu sebagai orang yang telah menyebabkan kecederaan parah, menyekat kemungkinan yang lain. PK adalah betul dalam membuat keputusan bahawa perayu yang menyebabkan kematian si mati (lihat perenggan 79–81).

(5) (oleh **Abdul Rahman Sebli JCA**, menentang) Adalah nyata bahawa SP13 tidak memahami sifat sumpah. Walau bagaimanapun, ia adalah situasi yang tepat dipertimbangkan oleh s 133A Akta. PK mendapati dia adalah saksi yang kompeten, walaupun tidak bersumpah selepas mendengar soalan dan jawapan lanjut untuk menentukan tahap kecerdikan SP13. Keterangan tidal bersumpah SP13 hendaklah disokong dalam butiran material seperti yang diperuntukkan proviso s 133A Akta. Sokongan tidak perlu menjadi keterangan langsung bahawa perayu melakukan kesalahan. Ia adalah mencukupi jika ia hanyalah keterangan mengikut keadaan akan kaitannya dengan jenayah. Bahagian penting keterangan tidak bersumpah SP13 adalah bahawa sewaktu dia dan si mati berada di dalam bilik air, perayu menenggelamkan kepala si mati di dalam besen yang berisi air. Ini disokong dengan keterangan SP8 bahawa air keluar daripada mulut dan lubang hidung si mati apabila dia menekan dada si mati. Terdapat juga keterangan pembantu pegawai perubatan bahawa rambut si mati sedikit basah apabila dia menguruskan si mati. Apa yang diberitahu oleh SP13 kepada mahkamah adalah oleh itu sokongan yang mencukupi kaitan perayu dengan jenayah (lihat perenggan 86–89).

(6) (oleh **Abdul Rahman Sebli JCA**, menentang) Tiada kemungkinan bahawa ia adalah SP12 yang telah menyebabkan kecederaan membunuh kepada dada dan abdomen si mati memandangkan dia masih berada di tempat kerjanya apabila si mati mengalami kecederaan. Berdasarkan pengakuan perayu bahawa SP12 menyayangi ketiga-tiga orang anaknya, terutama si mati, tiada sebab baginya untuk menyebabkan kecederaan yang boleh menyebabkan kematian kepada si mati (lihat perenggan 98–99).]]]]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2015) paras 301–419.

Cases referred to

AEG Carapiet v AY Derderian AIR 1961 Cal 359, HC (refd)
Abdullah Zawawi v PP [1985] 2 MLJ 16, SC (refd)
Arulpragasan a/l Sandaraju v PP [1997] 1 MLJ 1; [1997] 1 MLJ 389; [1997] 1 AMR 329, FC (refd)
Attan bin Abdul Gani v PP [1970] 2 MLJ 143b; [1969] 1 LNS 12 (refd)
Belhaven and Stenton Peerage (1875) 1 App Cas 278, HL (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307; [1962] 1 LNS 22, CA (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Eng Sin v PP [1974] 2 MLJ 168; [1974] 1 LNS 33, FC (refd)
Jee Chai Foo v PP [2015] 2 MLJ 695; [2014] 6 MLRA 296, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Martin v Osborne (1936) 55 CLR 367, HC (refd)
Mohamad Radhi bin Yaakob v PP [1991] 3 MLJ 169, SC (refd)
PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276; [1980] 1 LNS 58, FC (refd)
PP v Kasmin bin Soeb [1974] 1 MLJ 230 (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324 (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2005] 6 AMR 203, FC (refd)
PP v Saimin & Ors [1971] 2 MLJ 16; [1971] 1 LNS 115 (refd)
Powell and Wife v Streatham Manor Nursing Home [1935] AC 243, HL (refd)
Sidek bin Ludan v PP [1995] 3 MLJ 178; [1995] 1 LNS 219, HC (refd)

Legislation referred to

Child Act 2001 s 31(1)(a)
Criminal Procedure Code 182A
Evidence Act 1950 ss 3, 133A
Penal Code ss 302, 304

Appeal from: Criminal Trial No MTJ (2) 45B-02 of 2011 (High Court, Johor Bahru)

Amer Hamzah Arshad (Nizam Amer & Sharizad) for the appellant.
Lailawati bt Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] This is an appeal by the appellant Dewi Nadia bt Alias against conviction and sentence for an offence under s 302 of the Penal Code. We heard the appeal, at the end of which, the appeal was allowed by majority, comprising my learned brother Justice Mohtarudin bin Baki and I. My learned brother Justice

Abdul Rahman Sebli dissented. The following are the grounds for the majority judgment.

[2] The appellant was originally charged with her husband Norafizan bin Ludin for the murder of Nur Dania Qistina bt Norafizan ('the deceased'). The cause of death was blunt force trauma which was consistent with child battered syndrome or child abuse.

[3] In the midst of the trial, ie after four prosecution witnesses testified, the prosecution withdrew the charge against Norafizan bin Ludin, after his representation to the attorney general was allowed. The trial proceeded against the appellant, the stepmother to the deceased.

[4] The background facts have been extensively laid down by the learned judicial commissioner in his grounds of judgment. We do not wish to repeat them. Suffice to state that the evidence led by the prosecution through the sister of the deceased, Nur Dania Batrisya ('SP13') disclosed that the deceased had drowned. The appellant's neighbour and landlord, Musa bin Hj Othman ('SP8') stated that when he tried to resuscitate the deceased by pressing the deceased's chest, water came out from the mouth and nose of the deceased. Dr Rohayu bt Shahar Adnan, the pathologist ('SP5') however ruled out drowning as the cause of death. From the post-mortem conducted, SP5 concluded the cause of death to be blunt force trauma to the chest and abdomen.

[5] In determining whether the prosecution had made out a prima facie case for murder, the learned judicial commissioner considered whether the necessary ingredients of the offence have been proved:

> [30] ... pihak pendakwaan perlu membuktikan elemen atau 'ingredients' utama seperti di bawah berikut:
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> (i) Bahawa si mati (Nur Dania Qistina bt Norafizan) telah meninggal dunia.
>
> (ii) Bahawa kematian si mati (Nur Dania Qistina bt Norafizan) adalah akibat dari kecederaan yang dialaminya.
>
> (iii) Bahawa kecederaan yang menyebabkan kematian si mati (Nur Dania Qistina bt Norafizan) adalah kerana perbuatan Dewi Nadia bt Alias (OKT).
>
> (iv) Perbuatan OKT itu:
>
> (a) Menyebabkan kematian si mati yang dilakukan dengan niat hendak menyebabkan kematian; atau
>
> (b) Dilakukan dengan niat hendak menyebabkan sesuatu bencana tubuh yang OKT ketahui mungkin akan menyebabkan kematian si mati; atau

(c) Dilakukan dengan niat hendak menyebabkan bencana tubuh kepada si mati dan bencana tubuh itu adalah cukup pada lazimnya bagi menyebabkan kematian; atau

(d) Dilakukan dengan pengetahuan bahawa ianya amat berbahaya hingga mungkin membawa kepada kematian dan OKT melakukan perbuatan itu tanpa apa-apa sebab bagi mendatangkan bahaya yang menyebabkan kematian atau bencana tubuh seperti yang disebutkan.

[6] There was no issue on the first ingredient. On the second ingredient, the learned judicial commissioner found:

[41] Jadi berasaskan keterangan pemeriksaan post-mortem keseluruhannya maka SP5 memutuskan dan mengesahkan kematian si mati adalah disebabkan oleh 'blunt force trauma to the chest and abdomen'.

[42] Oleh itu Mahkamah ini sekali lagi memutuskan pihak pendakwaan juga berjaya membuktikan elemen kedua pertuduhan iaitu si mati meninggal dunia akibat 'blunt force trauma to the chest and abdomen' bersifat disengajakan ('non-accidental injuries').

[7] As for the third element or ingredient, namely that the injuries on the deceased which resulted in her death were inflicted by the appellant, the learned judicial commissioner said:

[43] Ini dibuktikan berdasarkan keterangan mengikut keadaan ('circumstantial evidences') oleh saksi-saksi pendakwaan ...

[8] The learned judicial commissioner alluded to the evidence of SP8, SP11, SP12 and SP13 as to what transpired on the day of the incident and to the evidence of SP5 on the injuries before coming to the conclusion that:

[68] ... Jadi berasaskan semua kecederaan ini khususnya kesan hentakan ('blunt force trauma') ke atas diri si mati dibuktikan oleh SP5 bukan diakibatkan oleh perbuatan si mati sendiri dan oleh itu satu-satunya 'inferen' yang wajar diketengahkan berkait 'blunt force trauma' ini ialah ianya lebih sejajar dengan hasil daripada perbuatan seorang dewasa yang berada di dalam rumah si mati ketika kejadian dan sepertimana kita sedia maklum sebelum ini cuma OKT seorang dewasa sahajalah yang berada bersama-sama dengan tiga orang anaknya ketika itu. Keadaan ini sudah pasti amat konsisten dengan keterangan SP13 yang menuding jari kepada ibu barunya (OKT) membawa malapetaka kepada nasib si mati pada hari kejadian yang berkenaan.

[9] And at para 70, the learned judicial commissioner stated that:

[70] Walau bagaimanapun, Mahkamah memutuskan bergantung pada keterangan mengikut keadaan sahaja pun sudah mencukupi untuk membuktikan bahawa OKTlah yang melakukan kecederaan 'blunt force trauma' menyebabkan si mati

(Nur Dania Qistina bt Norafizan) meninggal dunia dan ini disahkan pula oleh keterangan tidak bersumpah ('unsworn evidence') kanak-kanak 'of tender years' iaitu SP13 yang pasti bukanlah satu imaginasi atau fantasi tetapi satu kejadian yang dialami dan dilihat dengan matanya sendiri konsisten dengan keterangan sokongan berkecuali oleh saksi-saksi pendakwaan SP8, SP11, SP12 dan akhir sekali saksi pakar Pathologist (SP5) sejajar dengan kehendak peruntukan 'proviso' kepada s 133A Akta Keterangan 1950.

[10] Finally on the last ingredient ie whether the appellant had the intention to commit murder, the learned judicial commissioner found:

[74] Setelah memperhalusi keterangan keseluruhannya dan juga menilainya secara maksima maka Mahkamah ini merumuskan terdapatnya keterangan kukuh yang dapat membuktikan OKT sememangnya berniat mendatangkan kecederaan pada si mati berdasarkan fakta-fakta berikut:

(i) SP13 nampak ibu barunya (OKT) melemaskan si mati dengan meletakkan kepala ke dalam basin yang banyak air di dalam tandas rumah kediaman mereka.

(ii) SP8 tuan rumah di sewa oleh OKT sekeluarganya di dalam keterangannya menyatakan ketika berada di rumah tersebut beliau cuba mengejutkan si mati sambil menekan dadanya lalu keluar air dari dalam mulut dan hidungnya.

(iii) SP8 juga menyatakan pada pagi hari kejadian OKT datang ke rumahnya meminta tolong selamatkan si mati dalam keadaan kelam kabut panik dan kelihatan ketakutan.

(iv) SP8 dalam keterangan beliau seterusnya memberitahu bila beliau bertanya OKT kenapa dengan si mati maka jawapan diberikan oleh OKT sentiasa berubah-ubah seperti cuba menyembunyikan sesuatu bermula dengan alasan *si mati tidak sihat* dan kemudiannya apabila diselidik lebih lanjut OKT mengalih alasan *kononnya si mati jatuh dalam bilik air ketika mandi* dan apabila didesak lagi dengan soalan macam mana si mati boleh menjadi tidak bermaya dan tidak sedarkan diri maka OKT memberitahu *si mati jatuh dalam baldi*.

(v) Semua jawapan OKT kepada SP8 tersebut di atas tadi adalah jauh berbeza dengan apa yang dimaklumkan kepada jiran sebelah rumahnya iaitu SP11 yang pada mulanya OKT dikatakan memberitahu bahawa si mati mengalami *batuk, muntah dan terus pengsan*, tetapi ketika SP11 turut bersama di ruang tamu rumah OKT beliau ada melihat OKT cuba mengejutkan si mati dan meratap dengan kata-kata *'Qis, bangun Qis, ibu janji tidak pukul lagi'*. Reaksi OKT ini konsisten dengan perlakuan cuba untuk menyembunyikan fakta sebenar menimpa ke atas si mati bagi mengelakkan tindakan boleh diambil terhadap beliau.

(vi) Lagipun alasan OKT kononnya si mati jatuh dalam bilik air ketika mandi dan kemudiannya menukar jawapan tersebut kepada jatuh dalam baldi adalah bertentangan dengan keterangan Dr Rohayu bt Shahar Adnan

(SP5) seorang pakar Perunding Forensik (Pathologist) di Hospital Sultan Ismail, Johor Bahru, Johor, secara lisan menjelaskan menolak dakwaan adanya unsur-unsur lemas dan disebaliknya SP5 di dalam laporan pemeriksaan post-mortemnya (eksh P18) mengesahkan kematian si mati lebih kepada sifat dipukul atau dihentak menyebabkan si mati mengalami 'blunt force trauma to the chest and abdomen' konsisten dengan kata-kata ratapan OKT 'Qis, ibu janji tidak *pukul* lagi' yang didengari oleh SP11 semasa beliau berada diruang tamu rumah OKT pada pagi hari kejadian.

(vii) Bapa si mati sendiri bernama Norafizan bin Ludin (SP12) mengesahkan sebelum beliau ke tempat kerjanya pada awal-awal pagi hari kejadian tersebut di Pasir Gudang, Johor, si mati adalah dalam keadaan baik dan biasa sahaja macam hari-hari lain tanpa sebarang masalah kesihatan.

(viii) Menurut SP12 juga selepas beliau bertolak ke tempat kerjanya di Pasir Gudang, Johor, cuma terdapat OKT seorang sahaja dewasa yang berada di dalam rumah tersebut bersama-sama dengan tiga (3) orang anak tirinya ketika di tempat kejadian berlaku. Sekeping keterangan tersebut membuktikan SP12 tidak boleh dikaitkan langsung dengan kematian si mati berbanding dengan kedudukan OKT yang berada di dalam rumah tempat kejadian ketika itu.

(ix) Mengikut keterangan SP12 lagi pada jam lebih kurang 8.15 pagi hari kejadian tersebut beliau ada menerima panggilan telefon daripada isterinya (OKT) dalam keadaan cemas dan meminta tolong serta ketakutan tetapi tiba-tiba taliannya terputus begitu sahaja tanpa menerima panggilan semula daripadanya sehinggalah tidak lama kemudian SP12 menerima panggilan daripada SP8 memaklumkan si mati telahpun meninggal dunia. Perlakuan OKT tersebut amat aneh dan menimbulkan seribu macam persoalan yang boleh menggugat kredibiliti dan integriti keikhlasan dirinya sendiri menyelesaikan masaalah berkaitan hal kekeluargaan. Sepatutnya dalam hal kecemasan melibatkan kesihatan kanak-kanak, terutamanya anak tiri sepertimana dalam kes ini hendaklah secepat mungkin diberitahu hal tersebut kepada bapa kandungnya terlebih dahulu iaitu SP12 tetapi sebaliknya OKT beralih kepada SP8 yang langsung tidak ada tali persaudaraan dengannya. Kenapa begitu melainkan OKT cuba merahsiakan sesuatu daripada bapa si mati (SP12) hal sebenar kejadian. Ketulusan dan keikhlasan OKT dalam banyak hal amat-amat meragukan.

[75] Jadi berdasarkan keseluruhan keterangan yang diperjelaskan di atas itu maka Mahkamah berpuas hati ianya menzahirkan bahawa perbuatan OKT itu sememangnya berniat mendatangkan kecederaan teruk kepada tubuh badan si mati.

[11] Having found that the prosecution has made out a prima facie case against the appellant, the learned judicial commissioner called upon the appellant to enter her defence.

[12] The appellant gave evidence under oath. In evaluating the defence, the

learned judicial commissioner found:

[87] Setelah dikaji dan diteliti serta dihalusi keterangan yang dikemukakan oleh OKT dan juga SD2 maka mahkamah membuat kesimpulan pembelaannya menjurus kepada fakta-fakta berikut:

(i) ...

(ii) ...

(iii) ...

(iv) ...

(v) si mati dikatakan adalah kanak-kanak yang aktif dan lasak. si mati selalu bermain, bergayut di buaian (eksh P4D) dan memanjat tembok di hadapan rumah. Kadangkala si mati terjatuh dari buaian tersebut.

(vi) Mengikut keterangan OKT juga SP12 merupakan seorang yang panas baran sering melepaskan kemarahan kepada beliau dan anak-anaknya dan ada ketika OKT pernah melihat SP12 memukul anak-anaknya dan mencampakkan mereka.

(vii) Seterusnya OKT menyatakan beliau sendiri ada mengalami dikurung oleh SP12 dan kadangkala mendengar tangisan anak-anak yang dipukul oleh SP12.

(viii) OKT menafikan ada memukul, mendera dan mencederakan si mati atau anak tirinya yang lain kerana beliau sendiri menganggap mereka seperti anak-anak kandungnya sendiri.

(ix) Pada malam sebelum si mati meninggal dunia, beliau mengalami demam dan telah diberikan ubat panadol. Berikutnya pada 9 Januari 2010, OKT mendapati si mati terkencing di atas tilam. Lalu OKT meminta si mati dan Nur Dania Batrisya (SP13) supaya mandi bersama-sama di dalam bilik air kerana OKT perlu menjemur tilam yang basah tersebut.

(x) Kemudian OKT telah pergi mendapatkan Danish Irshad dan langsung tertidur bersamanya. Setelah tersedar semula OKT telah pergi mendapatkan si mati dan SP13 yang ketika itu berada bersama di dalam bilik air itu. Apabila tiba di bilik air tersebut, OKT melihat si mati telah tersandar di dinding bilik air namun SP13 masih sedang mandi. Keadaan si mati sudah tidak bergerak dan lalu OKT mengangkat si mati terus ke ruang tamu rumah disewa OKT sekeluarga.

(xi) OKT tidak tahu macam mana si mati boleh tersandar pada dinding bilik air tersebut ditempat yang bertanda 'Y' dalam eksh P4E.

(xii) OKT lalu pergi dari rumah itu mendapatkan bantuan jirannya iaitu tuan rumah disewanya (SP8) apabila melihat si mati sebegitu.

(xiii) Berikutnya SP8 telah datang ke rumah OKT dan mengangkat si mati menuju ke keretanya tetapi SP8 berpatah balik ke rumah OKT kerana takut apa-apa mungkin terjadi pada diri si mati ketika itu dan lalu SP8 kemudiannya meminta bantuan ambulan.

(xiv) Apabila SP8 membawa balik si mati ke rumah OKT dan baringkan diruang tamu rumah maka SP8 ada cuba mengejutkan si mati dengan menekan dadanya lalu terdapat air keluar dari mulut dan hidung si mati lalu SP8 pun meminta bantuan ambulan.

(xv) Setibanya pihak perubatan ambulan terus mereka memberikan bantuan kecemasan kepada si mati dan pegawai perubatan berkenaan mengesahkan si mati telahpun meninggal dunia.

(xvi) Setelah diberitahu si mati meninggal dunia maka OKT telah menangis dan meraung memanggil serta meminta si mati untuk bangun.

(xvii) OKT menafikan ada menyebabkan kecederaan dan kematian ke atas si mati.

(xviii) OKT tidak berniat untuk mendatangkan kecederaan ataupun kematian kepada si mati.

[13] At para 90 of the grounds of judgment, the learned judicial commissioner said:

(i) ...

(ii) ... Lagipun mengikut keterangan SP12 bahawa dia sendiri tidak tahu anaknya didera sehinggalah pada tarikh SP12 ditangkap pada 11 Februari 2012. Kalau dirujuk pada laporan bedah siasat (eksh P18) yang disediakan oleh Dr Rohayu bt Shahar Adnan (SP5) khususnya di perkara 4 ms 8 di ruangan 'Summary and Conclusions' ada tercatit 'the time of death was estimated between 6–9 am on the 9th January 2011'. Mengikut keterangan SP12 pada 9 Januari 2011 beliau bangun tidur pada jam lebih kurang 5.50 pagi bersiap-siap untuk bekerja lebih masa dan bertolak dari rumah jam 6.50 pagi ke tempat kerja dan sampai di sana jam 7.35 pagi dan seterusnya jam 8.00 pagi beliau masuk kerja. Lebih kurang jam 8.15 pagi SP12 dapat panggilan dari isterinya (OKT) dalam keadaan panik dan takut sehingga terputus talian telefon dan tidak lama kemudian terima panggilan telefon dari SP8 memberitahu anaknya Nur Dania Qistina binti Norafiza (si mati) telah meninggal dunia dan lalu sampai balik ke rumah sewanya pada jam 9.10 pagi.

Bertitik tolak dari fakta tersebut jelas membuktikan SP12 memang tidak berada di rumah kejadian ketika si mati dikatakan menerima ajalnya. Seperkara lagi yang perlu dititik beratkan di sini ialah keterangan SP12 yang menyatakan pada pagi hari kejadian sebelum beliau ke tempat kerja dia mendapati keadaan si mati macam biasa sahaja macam hari-hari lain masih sempat bersalam dengannya. OKT sendiri semasa disoalbalas mengaku dan bersetuju SP12 amat sayangkan anak-anaknya terutama si mati.

Keterangan juga menunjukkan satu-satunya orang dewasa yang berada di rumah tempat kejadian pada pagi yang malang itu bersama-sama si mati dan adik-adiknya ialah OKT. Jadi berdasarkan keterangan tersebut OKT

lah dan bukannya SP12 merupakan orang dewasa yang terdekat sekali mempunyai hubungan berinteraksi dengan si mati pada hari kejadian berkenaan. Maka undang-undang menghendaki OKT memberi penjelasan atau pembelaan yang munasabah dan yang boleh dipercayai kebenarannya dan bukannya satu penafian semata-mata atau cubaan memindahkan kesalahan ini kepada SP12. ...

...

(iii) ... mengikut keterangan Dr Rohayu bt Shahar Adnan (SP5) kematian si mati adalah disebabkan oleh 'blunt force trauma to the abdomen and chest' berdasarkan terdapatnya 77 kesan kecederaan ke atas jasad mayat si mati dan daripada 77 kesan kecederaan itu sebanyak 33 adalah berpusat di kepala dan kecederaan yang amat kejam sekali ialah terdapatnya lebam dan koyakan pada 'Koch's Triangle' di bahagian jantungnya menyebabkan peluang hidup amat tipis. Mengikut SP5 lagi semua kecederaan ini tidak konsisten dengan akibat 'simple fall' dan beliau juga menolak adanya unsur-unsur lemas dan malahan jangkitan di chest sahajapun tidak boleh sebabkan kematian.

Apa yang pasti mengikut keterangan SP5 kombinasi semua kecederaan ini adalah konsisten dengan keadaan 'battered child syndrome' atau 'child abuse'.

Kalau dirujuk laporan bedah siasat (eksh P18) yang disediakan oleh SP5 jelas menzahirkan satu kecederaan yang 'massive' ke atas kanak-kanak yang baru berusia tiga tahun untuk menahan kesakitan yang amat sangat dan dalam keadaan sedemikian mahkamah dapat merumuskan ianya bukan sekadar 'battered' atau 'abused' tetapi perbuatan tersebut lebih kepada tidak lain dan tidak bukan berniat untuk membunuh ataupun berpengetahuan perlakuannya itu akan mendatangkan kecederaan yang berkemungkinan besar menyebabkan kematian. ...

(iv) ... alasan OKT mengenai sebab-musabab kematian si mati ini sentiasa berubah atau bercanggah setiap kali memberitahunya kepada SP8 dan SP11. ...

Semasa diperingkat pembelaan ini pula OKT menafikan segala-galanya bahawa dialah yang mendatangkan atau menyebabkan kecederaan atau kematian ke atas si mati.

Jelas di sini keterangan OKT mengenai perkara ini melompat-lompat dari satu alasan kepada alasan yang lain langsung tidak menunjukkan pendirian yang konsisten.

Dengan wujudnya tiga versi keterangan yang berbeza ini membuktikan OKT cuba menyembunyikan apa yang sebenarnya berlaku ke atas diri si mati semasa bersama-sama berada di dalam rumah tempat kejadian. Penjelasan yang diberikan oleh OKT gagal menerangkan kejadian

sebenar yang menimpa diri si mati dan sekali gus gagal menimbulkan keraguan munasabah terhadap kes pendakwaan.

...

[91] Akhir sekali pakar bedah siasat (SP5) di dalam pemeriksaannya ke atas jasad si mati menolak dakwaan OKT kononnya ada unsur-unsur lemas dialami oleh si mati ...

[92] Sebaliknya SP5 memutuskan dan mengesahkan kematian si mati adalah disebabkan oleh 'blunt trauma to the chest and abdomen'.

[93] Keputusan SP5 ini sekali gus menempelak pembelaan yang diutarakan oleh OKT kononnya si mati menemui ajal disebabkan lemas di dalam baldi selepas tergelincir di atas lantai yang licin dalam bilik air tersebut.

[94] Jadi apa yang mahkamah boleh putuskan berhubung isu-isu pembelaan tersebut ialah ianya tidak berasas dan tidak bermerit.

[14] The appellant was thus convicted and sentenced to death, hence the appeal.

THE APPEAL

[15] Learned counsel for the appellant raised four grounds of appeal:

(a) no admissible evidence under s 133A of the Evidence Act 1950;

(b) intervening factor negating intention to commit murder;

(c) failure of the learned judicial commissioner to fairly appreciate the defence; and

(d) failure to consider whether a lesser offence has been committed by the appellant.

[16] On the first ground, the bone of contention of learned counsel was that although the learned judicial commissioner had carried out the preliminary inquiry to ascertain the comprehension of SP13 of the duty of speaking the truth and the nature of an oath, the learned judicial commissioner had erred in admitting the evidence of SP13 as the pre-conditions under s 133A of the Evidence Act were not met.

[17] On the second ground, the crux of the submission of learned counsel was that the actual cause of death was not attributed solely to the blunt trauma, but was contributed by other factors as the post-mortem report (exh P18) points to the following deductions:

(a) that the blunt injuries or blunt force trauma were sustained when the deceased was still alive;

(b) the bruises which were discovered on the body of the deceased could have been inflicted upon the deceased anytime between 15–24 hours before the deceased died;

(c) the deceased's lung was infected with bacterial colonies consistent with unresolved pneumonia even before the date of incident, which suggested that the deceased was neglected (ie did not receive proper or sufficient medical treatment to curb the infection); and

(d) the infection had contributed to the death of the deceased.

[18] On the third ground, the complaint of learned counsel was that the learned judicial commissioner made the following errors with regard the defence case:

(a) the learned judicial commissioner failed to appreciate the fact that SP8 had testified that water came out from the deceased's mouth when the former was trying to resuscitate the latter;

(b) the above evidence of SP8 was consistent with and corroborated the appellant's version;

(c) if the learned judicial commissioner had correctly admitted the unsworn evidence of SP13, then the testimony of SP13 that the deceased had drowned ought to be considered when evaluating the defence at the end of the case, which however was not done;

(d) from the unsworn testimony of SP13, there was no suggestion that the deceased had been beaten by the appellant;

(e) the learned judicial commissioner dismissed the notion that the deceased could have been drowned by relying mainly on the evidence of SP5, which appears to be inconsistent with the evidence of SP8 and SP13.

[19] The legal consequences of the failure, submitted learned counsel, were that the appellant was prejudiced in that the relevant evidence for the defence was not properly considered and evaluated and that there was a breach of s 182A of the Criminal Procedure Code.

[20] On the last ground, learned counsel submitted that the learned judicial commissioner had failed to consider there were other inferences which were favourable to the appellant and that such inferences indicated that the appellant may not have been guilty of murder, instead the appellant may be guilty of other lesser offences, such as culpable homicide not amounting to murder under s 304 of the Penal Code or under s 31(1)(a) of the Child Act 2001. Learned counsel submitted that the conviction against the appellant was not safe and that it ought to be set aside.

OUR FINDINGS

[21] The principal issue to be considered was whether the learned judicial commissioner was correct in convicting the appellant for murder based on the circumstances as alluded to in the grounds of judgment.

[22] It is trite that in cases where a conviction is based on circumstantial evidence, the evidence must point irresistibly to the conclusion of guilt of the accused and the accused alone and that every possible explanation other than the guilt of the accused has been excluded (see *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805).

[23] The learned judicial relied upon the following circumstances to find the appellant guilty:

(a) the appellant was the only adult at the house when the incident happened to the deceased;

(b) the appellant gave inconsistent and contradictory versions to SP8 and SP11 as to what happened to the deceased; and

(c) the appellant had uttered the words 'Qis bangun Qis, ibu janji tidak pukul lagi';

(d) the evidence of SP5 that the cause of death of blunt force trauma to the chest and abdomen; and

(e) the appellant's version that the deceased drowned has no merit in the light of the evidenc of SP5.

[24] The evidence of SP5 was that the deceased died as a result of the blunt force trauma. The learned judicial commissioner found that it was the appellant and nobody else who could have inflicted the injuries on the deceased. The basis ofsuch finding was that the appellant was the only adult with the deceased and her siblings when the deceased died.

[25] Having perused the record of appeal, we found that the learned judicial commissioner had misdirected himself in failing to properly appreciate the evidence and in failing to consider the evidence favourable to the appellant (see *Jee Chai Foo v Public Prosecutor* [2015] 2 MLJ 695; [2014] 6 MLRA 296).

[26] SP5 said (*rekod rayuan Jld* II: pp 343–346):

> Pemeriksaan pada paru-paru si mati menunjukkan semasa hidupnya beliau mengalami radang paru-paru ... radang paru-paru untuk jangka masa tertentu ... dan disebabkan tidak mendapat rawatan maka kuman-kuman ini telah membiak di buah pinggang. Terdapat juga kesan radang, atau jangkitan ... tisu daripada hati

A menunjukkan kesan koyak yang telah dimasuki oleh sel-sel darah putih. Maknanya kecederaan ini telah dialami oleh si mati anggaran diantara 24 jam hingga 15 jam sebelum beliau meninggal.

B **[27]** If the deceased was physically abused and that the injuries were sustained between 15–24 hours prior to her death, then it is incumbent for the learned judicial commissioner to exclude any other adult who had access to the deceased during that period of time, before concluding that nobody else, except the appellant, who could have inflicted the injuries on the deceased.

C **[28]** From the evidence, SP12's working hours was between 8am–5pm every day. SP12 came back from work at about 6pm every day. Undeniably, SP12 had access to the deceased 15–24 hours prior to her death as on 9 January 2011, SP12 left for work at about 6.50am.

D **[29]** The learned judicial commissioner had failed to direct his mind to the fact that SP12 also had access to the deceased during the time that the injuries, as testified by SP5, were suffered by the deceased. In failing to consider this aspect of the evidence, we found that the learned judicial commissioner had E misdirected himself and had erred in concluding that:

> 'cuma OKT seorang dewasa sahajalah yang berada bersama-sama dengan tiga (3) orang anaknya ketika itu' and 'OKT lah dan bukan SP12 merupakan orang dewasa yang terdekat sekali mempunyai hubungan berinteraksi dengan si mati pada hari kejadian berkenaan'.

F

[30] Further, there was no evidence from either SP8 or SP11 that they heard the deceased crying in the morning of 9 January 2011 to infer that the appellant had inflicted the said injuries on the deceased at the material time, G bearing in mind the presence of 77 injuries suffered by the deceased.

[31] The learned judicial commissioner had also relied on the evidence of SP11, namely that the appellant was said to have uttered the words 'Qis bangun Qis, ibu janji tidak pukul lagi'. The appellant denied uttering the said H words. In our judgment, even if she did utter the words, that piece of evidence is not sufficient to convict the appellant for the offence of murder as charged.

[32] On the alleged inconsistentand contradictory versions given by the appellant to SP8 and SP11 as to what happened to the deceased, the learned I judicial commissioner concluded that the appellant was trying to hide something. His Lordship drew the inference that the appellant had the guilty mind.

[33] Through the evidence of SP8 and SP12, the appellant was said to be in a state of panic. In our judgment, the different version given by the appellant to the queries made by SP8 and SP11, must be viewed objectively in the context ie that the appellant panicked and was not in the right frame of mind. The different answers that she had given, in our view, could not form the basis offinding her guilty.

[34] Further, the judicial commissioner had failed to consider that the appellant's version that the deceased fell in the bathroom was supported by the unsworn testimony of the child witness, SP13 and the evidence of SP12.

[35] The following was the evidence of SP13 (*rekod rayuan Jld* IV: pp 755 and 757):

TPR:	Ok Batrisya, tadi Batrisya kata adik Qis mati ya, Batrisya bagi tahulah untie macam mana adik Qis mati ini? Bagaimana dia mati?
DANIA:	Yang Arif, adik Qis mati kerana kena bunuh Yang Arif.
TPR:	Ok Batrisya kata bunuh ya, Batrisya tidak tahu bunuh itu apa ya, Tahu tidak bunuh itu apa?
DANIA:	Tidak tahu Yang Arif.
...	
...	
TPR:	Macam mana bunuh itu Batrisya?
DANIA:	Yang Arif adik Qis lemas Yang Arif.
TPR:	Macam mana adik Qis lemas ini Batrisya?
DANIA:	Kerana Yang Arif terdapat banyak air di dalam besen Yang Arif.
TPR:	Ok banyak air dalam besen ini di mana ini Batrisya? ...
DANIA:	Di tandas Yang Arif.
TPR:	Ok macam mana adik Qis lemas ini. Beritahulah untie.
DANIA:	Kerana Yang Arif kepala adik Qis diletak di dalam besen yang banyak air Yang Arif.

[36] SP12 had stated (*rekod rayuan Jld* III: p 684):

> ... Anak saya bernama Nur Dania Batrisya (SP13) keluar mendapatkan saya dan memaklumkan ... adik jatuh dalam baldi, lepas itu terus tak bangun.

[37] More importantly, there was no evidence that the appellant had any time physically abused or battered the deceased. The evidence of SP12 showed the contrary (*rekod rayuan Jld* III: p 696):

TPR: ... tadi kamu ada beritahu mahkamah hubungan OKT dan anak-anak kamu adalah ibu tiri dan anak tiri. Sekarang kamu beritahu, mahkamah bagaimana keadaan hubungan antara OKT dan anak-anak kamu?

NORA: Hubungan mereka baik sepanjang isteri saya mengasuh dan menjaga anak-anak saya. ... Mereka, anak-anak saya jadi makin baik, makin dengar kata. Jadi memang tak ada perkara yang pernah anak saya beritahu atau bangkitkan pasal ibu tiri dia.

[38] SP12 had also testified that the deceased was not well one or two days prior to her death and that the night before her death, the deceased was having fever (*rekod rayuan Jld* III: pp 705 and 710). This was consistent with the evidence given by the appellant (*rekod rayuan Jld* V: p 1047):

> ... pada malam sebelum kejadian, Qistina demam panas. Saya ada beritahu pada Norafizan ... Tapi Norafizan tak mahu bawa anak ke klinik. ... Dia hanya meminta saya untuk memberikan Panadol kanak-kanak.

[39] Given all the above, we found merits in the appeal. Nevertheless, for completeness, we will deal with the issue of admissibility of the evidence of SP13.

[40] SP13 was about six years old when she gave evidence in court. The reception of her evidence was governed by s 133A of the Evidence Act 1950 which provides:

> Where, in any proceedings against any person for an offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth; and his evidence, though not given under oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code [Act 593] shall be deemed to be a deposition within the meaning of the section:
>
> Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material evidence in support thereof implicating him.

[41] In dealing with the evidence of SP13, the learned judicial commissioner referred to the case of *Sidek bin Ludan v Public Prosecutor* [1995] 3 MLJ 178; [1995] 1 LNS 219. His Lordship conducted a preliminary enquiry to ascertain the understanding of SP13 on taking the oath and speaking the truth. While the learned judicial commissioner found that SP13 did not understand the nature of the oath and the duty to speak the truth, His Lordship found that SP13 possessed sufficient intelligence:

> [64] ... Mahkamah ada perhatikan di peringkat awal pertanyaan, SP13 di dalam keterangannya, mampu membezakan antara apa yang dikatakan reality dan fantasi misalnya beliau menyatakan watak sang kancil sebenarnya tidak wujud kerana ianya sekadar cerita kartun sahaja. Malahan keterangan SP13 berikutnya semasa perbicaraan menunjukkan beliau faham apa yang ditanyakan kepadanya dan boleh menjawab kepada soalan-soalan berkenaan dengan baiknya.

[42] We found no reason to disturb the finding of the learned judicial commissioner who had the opportunity to evaluate the understanding and intelligence of SP13 before accepting the unsworn evidence of SP13.

[43] In the final analysis, we found that the conviction of the appellant was not safe. The circumstances did not irresistibly point to the guilt of the appellant and the appellant alone and the combined strength of strands to make a rope is not strong enough to hang the appellant (*Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307). The appeal was therefore allowed by majority. The conviction and sentence imposed by the High Court was set aside. The appellant was acquitted and discharged.

Abdul Rahman Sebli JCA (dissenting):

[44] In the High Court at Johor Bahru the appellant was initially charged together with her husband Norafizan bin Ludin ('SP12') with the murder of her stepdaughter (SP12's biological daughter) and the charge against them was as follows:

> Bahawa kamu bersama-sama pada 9 Januari 2011 di antara jam 6.00 pagi hingga jam 9.00 pagi di rumah beralamat No: 1284-6, Jalan Tengku Mariam, Batu 17, Kampung Sungai Tiram, Ulu Tiram, dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim bagi mencapai niat bersama kamu semua telah melakukan bunuh ke atas Nur Dania Qistina Binti Norafizan (No. Mykid 080119-01-0672) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[45] However the charge against her husband was later withdrawn and thereupon the charge against the appellant was amended as follows:

> Bahawa kamu pada 9 Januari 2011 antara jam 6.00 pagi hingga jam 9.00 pagi, di rumah beralamat No: 1284-6, Jalan Tengku Mariam, Batu 17 1/2, Kampung Sungai Tiram, Ulu Tiram, dalam daerah Johor Bahru, di dalam negeri Johor Darul Ta'zim telah melakukan bunuh ke atas Nur Dania Qistina Binti Norafizan (No. Mykid: 080119-01-0672) dan dengan itu kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

[46] She claimed trial to the amended charge at the conclusion of which she

was found guilty by the learned judicial commissioner ('the learned JC') and sentenced to death. This is her appeal against conviction and sentence.

[47] The facts as disclosed by the evidence led by the prosecution are as follows. On 9 January 2011 at about 8.30am Musa bin Haji Othman ('SP8') was sleeping when the appellant came over to his house in haste ('tergesa-gesa'), informing him that her step daughter Nur Diana Qistina ('the deceased') was not well and asked for his help to send the child to the clinic as her husband (SP12) had gone to work. The house where the appellant and her family stayed was rented from SP8 and was not far from SP8's house.

[48] After putting on his shirt SP8 rushed to the appellant's house together with the appellant. When he arrived at the house he saw the deceased lying on her back in the living room. She was only wearing pampers. He carried her to his car with the intention of bringing her to the clinic but half way through he realised that she was lifeless. Fearing that something untoward might happen to the little girl, SP8 turned back to the appellant's rented house. He laid down the deceased back in the living room and asked the appellant what happened to the deceased. The appellant told him that she had fallen in the bathroom while taking her bath with her elder sister 'Ecah'. According to SP8 the appellant was crying and asking the deceased to wake up.

[49] SP8 noticed that the deceased's body had turned pale. He tried to revive her by pressing her chest and when he did this water came out from her mouth and nostrils. SP8 again asked the appellant how the deceased came to be in that condition. This time the appellant told him that she had fallen into a pail of water. SP8 then called the ambulance, which responded by arriving at the appellant's house about 15–20 minutes later. The assistant medical officer on call Mohd Hamka bin Sarijan ('SP9') confirmed that when he arrived at the appellant's house the deceased was already dead. He testified that he could clearly see bruises on the deceased's face. SP8 then called the police and SP12 asking him to come home.

[50] Surijah bt Rasah ('SP11') was the appellant's next door neighbour. On the morning of the incident she saw the appellant running towards SP8's house and knocking the door. She went over to the appellant's house to check out what was going on. She asked the appellant what happened to the deceased and was told by the appellant that the deceased had coughed, vomited and then fainted. SP11 said the appellant tried to wake the deceased up by saying 'Qis bangun Qis, ibu janji ibu tak pukul lagi'. ('Qis wake up Qis, mum promise mum will not hit again').

[51] It was also SP11's testimony that she used to hear the sound of a child crying, usually in the evening coming from the appellant's house. She said she

only heard the cries in the evening as in the morning she would be away from home attending to her business.

[52] SP12 is the appellant's husband and they were married on 22 November 2010. Less than two months into the marriage his second daughter the deceased was dead under very tragic circumstances. She was only three years old when she died. SP12 had two other children from his previous marriage. He said the appellant was a housewife and it was she who looked after his three children.

[53] On events that took place on the morning of 9 January 2011, SP12's testimony is that he woke up as usual at 5.50am, took his bath and then prepared food for his children and his wife before leaving for work at about 6.50am. He said as usual his three children including the deceased shook his hand ('bersalaman') before he left for work.

[54] As for the deceased's health condition, SP12's testimony is that the night before 9 January 2011 the deceased did tell him that she was having fever ('demam') and asked for panadol. SP12 testified that he had no idea that the deceased had been abused, not until he was told by the hospital authorities on 9 January 2011.

[55] SP12's further testimony is that at about 8.15am on the morning of the incident he received a frantic call from the appellant asking for help but the line was suddenly cut off. He tried to call back using his friend's handphone but the appellant did not answer. A short while later he received a call from SP8 informing him that his daughter had passed away. SP12 went straight home. The police were already there when he reached home and was told that the deceased had to be brought to the hospital for a post-mortem.

[56] He asked the appellant what happened to the deceased but the appellant did not tell him anything. When asked whether he saw the deceased's body upon reaching home, SP12 said he did not as he was overcome by emotion, too sad and feeling weak. However he followed the police party to the hospital to send the body for a post-mortem, after which he lodged a police report.

[57] The post-mortem on the deceased's body was carried out the following day by forensic pathologist Dr Rohayu bt Shahar Adnan ('SP5'). She found 77 marks of injury on her body. According to her, all these injuries were caused by force blunt trauma. To appreciate the extent of this little girl's suffering during her brief existence, I reproduce below the full list of injuries that were inflicted on her:

1. Bruised abrasion on the right side of forehead measuring 1.3 x 1 cm.
2. Bruise on the right side of forehead measuring 2x2 cm.
3. Bruise on the left side of forehead measuring 1.8 x 0.5 cm.
4. Bruise on the left side of forehead measuring 1.5 x 1 cm.
5. Bruised abrasion lateral to the right eye brow measuring 0.4 x 0.4 cm.
6. Bruised abrasion lateral to the eye brow (temple) measuring 0.8 x 0.8 cm.
7. Bruise on the right upper eye lid measuring 0.7 x 1.2 cm.
8. Bruise on the left upper eye lid measuring 2 x 0.8 cm.
9. Bruise and abrasion on the right cheek collectively measuring 3x2 cm.
10. 10. Pattern bruise across both right and left nasolabial folds and nasal bridge measuring 7.5 x 0.6 cm.
11. Abrasions on the upper lip measuring 2.5 x 0.6 cm.
12. Abrasions on the lower lip measuring 3.5 x 0.5 cm.
13. Two bruises 0.7 cm apart on the right cheek each measuring 0.3 x 0.3 and 0.2 x 0.5 cm respectively.
14. Bruise on the lower aspect of the right cheek measuring 0.5 x 0.4 cm.
15. Bruise on the right side of jaw line adjacent to the chin measuring 0.4 x 0.8 cm.
16. Bruise beneath the chin overlying the jaw line measuring 0.8 x 1 cm.
17. Bruise beneath the chin overlying the jaw line on the left side measuring 1.2 x 2.3 cm.
18. Bruise on the left cheek measuring 4 x 2.5 cm.
19. Scattered abrasions on the pinna of right ear covering an area of 3.5 x 0.8 cm.
20. Abrasion on the left ear pinna measuring 0.2 x 0.4 cm.
21. Bruise on the left temple measuring 4.5 x 3 cm.
22. Abrasion on the left side of head measuring 0.4 x 0.5 cm.
23. Bruise on the left side top of head measuring 0.6 x 0.5 cm.
24. Bruise and abrasion on the left side top of head collectively measuring 1.2 x 0.7 cm.
25. Abrasion on the left side top of head collectively measuring 1.2 x 0.7 cm.
26. Bruise on the right side top of head measuring 0.4 x 0.4 cm.
27. Bruise on the right side top of head measuring 4 x 3 cm.

28. Bruise abrasion measuring 5 x 3 cm with superficial laceration measuring 0.5 x 0.1 cm on the right side of head.

29. Bruise on the right side of head measuring 4 x 3 cm.

30. Multiple abrasions on the back of right ear collectively measuring 5.5 x 1.2 cm.

31. Bruised swelling behind the right ear measuring 6 x 2.5 cm.

32. Bruised swelling behind the left ear measuring 6 x 3 cm.

33. Multiple abrasions on the back of left ear collectively measuring 6 x 2 cm.

34. Bruise on the right side upper back of torso measuring 1.3 x 1.3 cm.

35. Bruise on the left upper back of torso measuring 2.3 x 2.2 cm.

36. Bruise on the left side upper back of torso (below wound no.35) measuring 1.2 x 2 cm.

37. Confluent bruises along the back bone measuring 5.5 x 2.5 cm.

38. Bruise on the lower aspect of the back bone measuring 1.3 x 1.3 cm.

39. Bruise on the left lower back of torso measuring 1.2 x 1.2 cm.

40. Bruise on the right flank above the iliac spine measuring 2.2 x 1.8 cm.

41. Abrasion on the back of right arm medially measuring 1.4 x 1.3 cm.

42. Abrasion on the back of right arm laterally measuring 0.5 x 0.6 cm.

43. Bruise on the back of right forearm measuring 0.6 x 0.4 cm.

44. Bruise on the back of right hand measuring 1.2 x 0.9 cm.

45. Left arm was deformed and swollen due to underlying healed fracture of the left humerus which hardened and united. Bruise on the back of left arm measuring 0.3 x 0.3 cm.

46. Bruise on the back of left arm measuring 0.3 x 0.2 cm.

47. Bruise medial to the left elbow measuring 0.8 x 0.6 cm.

48. Bruise on the back of left forearm measuring 0.8 x 0.6 cm.

49. Bruise on the back of left forearm measuring 1 x 0.7 cm.

50. Bruise on the back of left forearm measuring 1.2 x 0.8 cm.

51. Bruise on the back of left forearm measuring 0.4 x 0.3 cm.

52. Bruised abrasion in front of right shoulder measuring 2 x 0.4 cm.

53. Bruise on the right side of chest below the right clavicle measuring 0.7 x 0.7 cm.

54. Bruise on the right clavicle measuring 1.4 x 0.6 cm.

55. Bruise on the right side of chest measuring 0.5 x 0.4 cm.

56. Bruise on the right side of chest measuring 2.5 x 1.3 cm.
57. Bruise on the left lower quadrant of the abdomen measuring 1 x 0.7 cm.
58. Bruises on the mons pubis measuring 0.7 x 1 cm.
59. Bruise on the antero-lateral aspect of right arm measuring 0.7 x 0.5 cm.
60. Bruise on the lateral aspect of the right arm measuring 0.7 x 0.4 cm.
61. Bruise on the front of right arm measuring 0.8 x 0.8 cm.
62. Bruise on the lateral aspect of the right wrist measuring 0.8 x 0.7 cm.
63. Bruise on the front of left arm measuring 0.6 x 0.8 cm.
64. Bruise on the front left arm measuring 0.6 x 0.6 cm.
65. Bruise on the front left arm measuring 2.1 x 1.5 cm.
66. Bruise on the front of left forearm measuring 0.4 x 0.4 cm.
67. Bruise on the left sternocleidomastoid muscle outline lateral aspect left side of neck measuring 1 x 0.4 cm.
68. Bruise on the left flank measuring 0.6 x 0.5 cm.
69. Bruised abrasion on the front right thigh measuring 0.9 x 0.5 cm.
70. Bruise on the front of right thigh lower third measuring 0.9 x 0.5 cm.
71. Bruise on the right knee measuring 1.1 x 0.7 cm.
72. Bruise on the right leg measuring 0.9 x 0.5 cm.
73. Bruise on the front left thigh lower third measuring 0.5 x 0.7 cm.
74. Bruise on the inner aspect front of left thigh lower third measuring 0.4 x 0.6 cm.
75. Bruise on the inner aspect of left knee measuring 0.4 x 0.4 cm.
76. Bruise on the left leg measuring 0.4 x 0.4 cm.
77. Bruise on the left leg measuring 0.4 x 0.3 cm.

[58] In her oral testimony SP5 testified that the deceased was suffering from a battered child syndrome or child abuse. According to her, of the 77 external injury marks, 33 were concentrated on the head and the other 44 on the upper and lower body and were all caused by blunt objects such as hand, fingers and the act of pinching, slapping and prodding. According to her none of the injuries was consistent with a fall alone.

[59] SP5's post-mortem report is at exh P18 and her conclusions are as follows:

1. The body was that of a Malay female toddler identified by the investigating police officer and her father as the above named person.

2. Post mortem examination showed extensive blunt injuries throughout her body which was not consistent with fall alone. The internal injury of acute right parietal haemorrhage, right posterior cranial fossa fracture, resolving retinal haemorrhage and mal-alignment of the healed left humerous were consistent with non accidental injuries.

3. Gross examination showed pathological findings in the lungs and heart. Further microscopic examination revealed chronic inflammatory reactions in the lungs and heart consistent with bronchopneumonia and myocarditis (chest infection). The lung infection was fulminant with abundant bacterial colonies consistent with unresolved pneumonia suggestive of insufficient or lack of medical treatment given to curb the infection. In addition, the gross findings of contusions in the heart and microscopic findings of necroses and haemorrhages (interstitial haemorrhages appreciated with contraction bands) are in keeping with cardiac contusion resulted from blunt injuries to the chest.

   There was also lacerated liver seen on gross examination with extensive necroses, haemorrhages and fatty changes seen microscopically consistent with injuries sustained when the deceased was alive. These injuries were due to blunt trauma.

   Both injuries to the chest and abdomen with underlying disseminated infection were incompatible with life.

4. Post mortem examination showed Potassium level in vitreous fluid of 11.37 mmo1/L. Therefore according to Mulla method {6.41 (11.37-46.25 = 26.63} the post mortem interval was approximately 27 hours. The hypostasis and rigor mortis indicate that post mortem interval was more than 24 hours. Therefore the time of death was estimated between 6–9 am on the 9th January 2011.

[60] According to SP5, injuries that are inflicted externally can have effect on the internal organs. In this regard her internal examination of the deceased revealed, amongst others that the right posterior cranial fossa in the base of the skull was fractured and the left liver lobe adjacent to the falciform ligament was lacerated approximately 2.5 cm deep. According to her the fracture at the base of the skull was caused by force blunt trauma. There was subdural haemorrhage on the right parietal meninges, which she explained refers to the thin membrane just beneath the brain.

[61] SP5 also found contusion and laceration in the right atrium and right ventricle of the heart at the Koch's triangle region. Contusion according to her means bruise. She confirmed the existence of these injuries by carrying out a

microscopic examination. SP5 also found bruises on the deceased's intestines which were also caused by force blunt trauma, this time aimed at her abdomen. The cause of death as determined by SP5 was 'BLUNT FORCE TRAUMA TO THE CHEST AND ABDOMEN'.

[62] In SP5's expert opinion the internal injury to the heart at the Koch's triangle region was the most fatal and that the chances of surviving this injury were slim as it was an area that controls the heart beat. According to SP5 this injury could not have been self-inflicted by the deceased or due to a fall. A simple fall according to her would not cause internal injury but a violent push to the wall or floor could. SP5 confirmed that the deceased did not die of drowning either, based on the following facts:

(a) there was no frothing in the nose and mouth;

(b) mere drowning would not result in bruises;

(c) there was absence of liquid at the base of the deceased's skull; and

(d) there was no sign of 'hyperinflated lungs'.

[63] The sum total of SP5's expert testimony is that the deceased's death was due to homicide and not due to accident or misfortune. SP5's evidence must be accepted as there is no expert evidence to the contrary nor was her evidence undermined by cross-examination. In fact there was no challenge to her evidence that a combination of the internal injuries to the chest and abdomen were fatal and that these were the injuries that caused the deceased's death.

[64] On these facts the learned JC found, rightly in my view that a prima facie case had been established against the appellant and he accordingly called for her defence. The appellant elected to give sworn evidence and called her stepsister ('SD2') to support her case. She denied causing the deceased's death. Instead she put the blame on her husband SP12 and SP12's ex-wife as being responsible for her death. She said SP12 was a hot tempered husband who often vented his anger on her and the children. She went on to say that the deceased was a hyperactive girl who was fond of swinging about ('bergayut') in the cradle, climbing on the embankment wall in front of the house and sometimes she fell down while doing that.

[65] With regard to the incident on the morning of 9 January 2011 her testimony is that she had asked the deceased and her elder sister 'Ecah' to take bath as she had to dry the mattress which the deceased had urinated on. She said she was sleeping while they were taking their bath. When she woke up, she went to the bathroom and saw the deceased in a sitting position and leaning against the wall while 'Ecah' was still taking her bath. According to the appellant the deceased was motionless when she saw her, so she carried her to

the living room. After that she went over to SP8's house to seek help.

[66] Without a doubt the appellant's defence was that she had nothing to do with the deceased's death as she was sleeping at the time of the incident. It was a classic defence of bare denial. She was of course suggesting that the deceased's death could be due to a fall or drowning or even the work of her husband (SP12) and his ex-wife.

[67] Having given very careful consideration to the defence case, the learned JC found the appellant's explanation to be baseless and without merit. In the premises he found the appellant guilty and sentenced her accordingly. Before us counsel for the appellant raised four grounds of appeal, as follows:

(a) there is no admissible evidence to establish the element that the appellant caused the injury that caused the death of the deceased;

(b) the existence of a contributing/intervening factor(s) which had the effect of negating any inference to suggest that the appellant had the required intention to commit murder;

(c) the learned JC failed to fairly and justly appreciate the defence case and re-evaluate the evidence in its entirety; and

(d) the learned JC failed to consider the inferences that the appellant could have committed other offences other than murder based on the evidence.

[68] It is clear that the appellant's appeal is fact based and against findings that were dependent on the credibility of the witnesses. The first ground of appeal raises the question of who actually caused the deceased's death. The second, third and fourth grounds of appeal overlap and shall be dealt with together. Basically they relate to the question of whether the learned JC had considered all relevant factors in dealing with the defence case.

[69] Perhaps it is appropriate at this juncture for me to set out what were the findings of fact that the learned JC had arrived at in this case. They are the following:

(a) that the deceased had died on 9 January 2011;

(b) that the deceased died due to 'blunt force trauma to the chest and abdomen';

(c) the deceased's death was not caused accidentally;

(d) that the injuries that caused the deceased's death were caused by the appellant;

(e) that the appellant intended to cause the injuries that caused the deceased's death;

(f) the injuries that the appellant intended to cause were sufficient in the ordinary course of nature to cause death; and

(g) the appellant knew that her act was so dangerous that it must in all probability cause death.

[70] The question for determination in this appeal is whether, in arriving at these findings of fact, the learned JC had committed any error of law or that his findings are perverse and against all probabilities of the case. If the learned JC had not committed any error of law and his findings are in fact supported by the evidence, it is this court's duty to uphold the conviction and sentence and thereby avoid a serious miscarriage of justice in the sense that a guilty person may be acquitted of a heinous crime. The reverse would of course be true *mutatis mutandis*.

[71] An appellate court's approach in dealing with an appeal of this nature is well settled and there is sufficient adjective law on the point. Suffice for me to cite the decision of the House of Lords in *Powell and Wife v Streatham Manor Nursing Home* [1935] AC 243; 104 LJ KB 304 ; 152 LT 563; 79 SJ 179; 51 TLR 289 where Lord Wright said:

> Two principles are beyond controversy. First it is clear, that, in an appeal of this character, that is from the decision of a Trial Judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal 'must, in order to reverse, not merely entertain doubts whether the decision below is right, but must be convinced that it is wrong'.

[72] There can be no argument that the learned JC found the witnesses called by the prosecution to be trustworthy and credible witnesses for otherwise he would not have called for the defence. In evaluating the prosecution's evidence he had properly directed his mind to the principles laid down in the following authorities: *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734; *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2005] 6 AMR 203; *Arulpragasan a/l Sandaraju v Public Prosecutor* [1997] 1 MLJ 1; [1997] 1 MLJ 389; [1997] 1 AMR 329; *Abdullah Zawawi v Public Prosecutor* [1985] 2 MLJ 16; and *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230.

[73] I shall deal with the first ground of appeal first. The contention by counsel is that there is 'no admissible evidence' to prove that it was the appellant who caused the deceased's death. I must confess I am unable to comprehend what counsel means by 'no admissible evidence' in the context of the present case. Section 3 of the Evidence Act 1950 ('the Evidence Act') defines 'evidence' as to include:

(a) all statements which the court permits or requires to be made before it by witnesses in relation to matters of fact under inquiry: such statements are called oral evidence;

(b) all documents produced for the inspection of the court: such documents are called documentary evidence.

The word 'fact' on the other hand is defined to mean and includes:

(a) any thing, state of things or relation of things capable of being perceived by the senses;

(b) any mental condition of which any person is conscious;

[74] Evidence to prove any fact in issue can either be direct or circumstantial. A fact is proved if, in the words of s 3 of the Evidence Act 'its existence is so probable that a prudent man ought, under the circumstances of the particular case, to act on the supposition that it exists'. It is not rocket science or complicated algorithm.

[75] In the instant case the crucial fact in issue in relation to the first ground of appeal is whether it was the appellant who inflicted the force blunt trauma to the deceased's chest and abdomen. It is these injuries that the court must focus its attention on as these were the fatal injuries that caused the deceased's death. The rest of the injuries although relevant are not determinative of the fact in issue as they were not fatal in nature.

[76] The evidence as to who caused the fatal injuries is entirely circumstantial as no one saw who inflicted them. The question therefore is whether the circumstantial evidence is strong enough to support the learned JC's finding that it was the appellant who caused them. In *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307; [1962] 1 LNS 22 Thompson CJ had this to say on circumstantial evidence:

> That the evidence was entirely circumstantial and what the criticism of it amounts to is this, that no single piece of that evidence is strong enough to sustain the conviction. That is very true. It must, however, be borne in mind that in cases like this where the evidence is wholly circumstantial what has to be considered is not only the strength of each individual strand of evidence but also the combined strength of these strands when twisted together to make a rope. The real question is: is that rope strong enough to hang the prisoner?

[77] In the House of Lords case of *Belhaven and Stenton Peerage* (1875) 1 App Cas 278 Lord Cairns said at p 279:

> In dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray

> of light so feeble that by itself it will do little to illuminate a dark corner. But on the other hand you may have a number of rays, each of them insufficient but all converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[78] In *Eng Sin v Public Prosecutor* [1974] 2 MLJ 168; [1974] 1 LNS 33 Gill CJ in delivering the judgment of the Federal Court quoted with approval the following passage in *Martin v Osborne* (1936) 55 CLR 367 at p 375:

> If an issue is to be proved by circumstantial evidence, facts subsidiary to or connected with the main fact must be established from which the conclusion follows as a rational inference. In the inculpation of an accused person the evidentiary circumstances must bear no other reasonable explanation. This means that, according to the common course of human affairs, the degree of probability that the occurrence of the facts proved would be accompanied by the occurrence of fact to be proved is so high that the contrary cannot reasonably be supposed. The circumstances which may be taken into account in this process of reasoning include all facts and matters which form constituent parts of ingredients of the transaction itself or explain or make intelligible the course of conduct pursued.

[79] In finding that it was the appellant who caused the fatal chest and abdominal injuries, it is obvious that the learned JC relied on the following strands of circumstantial evidence:

(a) the night before the incident the deceased was well and was only having fever when SP12 left for work on the morning of the incident. According to SP12, she was behaving normally that morning like any other day without any health problem. She even 'bersalaman' with him when he was leaving for work. Thus the fatal force blunt trauma to the deceased's chest and abdomen must have been inflicted after SP12 had left for work and before the appellant went to SP8's house to seek for help;

(b) the appellant was the only adult in the house at the time the deceased met her death. This evidence comes from the unchallenged and uncontradicted testimony of her husband (SP12) and to a certain extent the testimony of SP8. Thus, no one else could have caused the fatal blunt force injuries to the deceased's chest and abdomen other than the appellant;

(c) the appellant at first told SP8 that the deceased fell down in the bathroom but later changed her story when she said that the deceased fell into a pail of water, and this was after water was seen coming out from the deceased's mouth and nostrils when SP8 pressed her chest in an attempt to revive

her. This inconsistency casts doubts on her accounts as to the real circumstances of the deceased's death;

(d) the appellant told SPll that prior to her death, the deceased was coughing, vomiting and then fainted. This is completely different from what she told SP8. The inconsistency is very telling. She could very well have been telling the truth here but this cannot be construed in her favour. On the contrary it is evidence that incriminates her as it shows that she was indeed with the deceased shortly before her death;

(e) when her husband (SP12) asked her what happened to the deceased on his arrival from his work place, the appellant did not say anything. This is odd as SP12 was her husband and the biological father of the deceased. If she could tell SP8 and SPll, why not her own husband?;

(f) the appellant frantically called SP12 by phone to ask for help only to cut off the line when he answered and she never called back. Neither did she answer SP12's return call. If indeed she had nothing to do with the deceased's death, the natural thing for her to do would have been to explain to SP12 the real circumstances of the deceased's death. The truth is, she must have realised by then that her act had caused the deceased's death. This explains her panicky behavior;

(g) SP13's unsworn testimony that the appellant immersed the deceased's head in a basin filled with water;

(h) the appellant's claim that the deceased could have drowned or had fallen on the bathroom floor while she was sleeping is a proven lie as SP5 ruled out accidental death by drowning or a fall. SP5's evidence is clear and unequivocal, that the deceased died due to 'blunt force trauma to the chest and abdomen'. This deliberate lie by the appellant is proof that she was hiding the real circumstances of the deceased's death. There was no reason for her to hide anything if she had done nothing wrong to the deceased;

(i) the unchallenged and uncontradicted evidence of the pathologist (SP5) that the time of death was between 6–9am. This is key to unlocking the mystery as to who caused the fatal chest and abdominal injuries on the deceased. This piece of evidence ties up with SP12's testimony that when he left for work at 6.50am the deceased was alive and well and that the appellant was the only adult in the house. It ties up with the evidence of SP9 that the deceased was already dead when he arrived at the appellant's

house to answer SP8's call for an ambulance. The time was around 9am. Thus it was within this two hour period that the deceased met her death.

This independent and neutral evidence from SP5 as to the time of death proves beyond any reasonable doubt that the 'blunt force trauma to the chest and abdomen' which caused the deceased's death between 6–9am on 9 January 2011 were caused by the appellant and no one else. The injuries could not have been caused by the other two children in the house and neither could the injuries be self inflicted by the deceased; and

(j) in trying to wake the deceased up the appellant had said 'Qis bangun Qis, ibu janji ibu tak pukul lagi'. This is a clear manisfestation of her feeling of guilt, regret and fear after realising that she had just killed the deceased. In pleading for the deceased to wake up, she was hoping that somehow the deceased would survive her violent assault and thereby save her from criminal responsibility. There was no reason for her to mention hitting the deceased if she had not assaulted her.

[80] Taken individually these strands of evidence are insufficient to tie the appellant with the death of the deceased but the united force of all the circumstances put together irresistibly and unerringly point to the appellant as the person who inflicted those fatal injuries, barring fanciful possibilities. That is the only reasonable inference that will account for all the proved facts. To quote again Lord Cairns in *Belhaven and Stenton Peerage*:

> But on the other hand you may have a number of rays, each of them insufficient but all converging and brought to bear upon the same point and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.

[81] On the evidence before him the learned JC was plainly right in my view in coming to the conclusion that it was the appellant who caused the deceased's death. The converging rays of light that bear upon the same point and producing a body of illumination had cleared away the darkness that he was endeavouring to dispel.

[82] The first ground of appeal also complains about the calling of the deceased's six year old elder sister Nur Dania Batrisya (SP13) to give evidence. She is also known as 'Ecah' and was five years old at the time of the incident. It was submitted that the learned JC committed an error of law in exercising his discretion to admit the unsworn evidence of SP13. The basis of the complaint is that the preconditions for admission of such evidence under s 133A of the Evidence Act was never met in that the learned JC failed to enquire whether the child possessed sufficient intelligence to justify reception of her evidence. Section 133A provides as follows:

Where, in any proceedings against any person for any offence, any child of tender years called as a witness does not in the opinion of the court understand the nature of an oath, his evidence may be received, though not given on oath, if, in the opinion of the court, he is possessed of sufficient intelligence to justify reception of the evidence, though not given on oath, but otherwise taken and reduced into writing in accordance with section 269 of the Criminal Procedure Code [Act 593] shall be deemed to be a deposition within the meaning of that section:

Provided that, where evidence admitted by virtue of this section is given on behalf of the prosecution, the accused shall not be liable to be convicted of the offence unless that evidence is corroborated by some other material in support thereof implicating him.

[83] The precondition for the admission of such evidence is that the child witness is possessed of sufficient intelligence to justify reception of his or her evidence, though not on oath. Clearly this is a matter for the trial court to ascertain.

[84] Counsel reproduced the following excerpts from the notes of proceeding to show that SP13 did not possess sufficient intelligence to justify reception of her evidence:

TPR:	Kalau kita cakap dengan kawan-kawan kita kena cakap apa ya Batrisya?
DANIA:	Tidak tahu Yang Arif.
TPR:	Tidak apa, Batrisya tidak tahu ya. OK sekarang auntie tanya lagi. Batrisya tahu tidak apa itu cakap benar? Tahu tidak?
DANIA:	Tidak tahu Yang Arif.
TPR:	Tidak apa, OK sekarang auntie tanya lagi. Batrisya tahu tidak apa itu cakap tipu?
DANIA:	Juga tidak tahu Yang Arif.
TPR:	OK auntie Tanya lagi. Batrisya tahu tidak kenapa Batrisya kena datang mahkamah ini? Sebab apa ya? Batrisya jawab lah.
DANIA:	Tidak tahu Yang Arif.

[85] This prompted the learned JC to make the following remarks in the midst of the enquiry:

Kedua-dua soalan tersebut mahkamah dapati dia tidak tahu apa cakap benar dan apa cakap tipu disini. In fact turutan daripada itu, baru tadi soalan ditanya kepada saksi di sini berkenaan dengan sama ada dia tahu sumpah atau tidak, itu pun dia tidak tahu apa dia itu sumpah kan.

[86] It is obvious that SP13 did not understand the nature of an oath. But

that is precisely the situation contemplated by s 133A of the Evidence Act, ie that where a child witness does not understand the nature of an oath, his evidence can still be admitted if the trial court is satisfied that he is intelligent enough to understand what he is talking about on important events.

[87] In this regard the learned JC after hearing further questions and answers to determine the level of SP13's intelligence found her to be a competent witness, though not on oath. This is a finding that this court is loathe to interfere with without any valid reason and there is none in this case. There is therefore no merit in counsel's submission that the learned JC had erred in exercising his discretion to admit the unsworn testimony of SP13.

[88] The unsworn testimony of SP13 must of course be corroborated in material particulars. This is the safeguard provided by the proviso to s 133A. But corroboration need not be direct evidence that the appellant committed the offence. It is sufficient if it is merely circumstantial evidence of her connection with the crime: *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143b; [1969] 1 LNS 12.

[89] The crucial part of SP13's unsworn evidence is that while she and the deceased were in the bathroom, the appellant immersed the deceased's head in a basin filled with water. This is corroborated by the evidence of SP8 that water came out from the deceased's mouth and nostrils when he pressed her chest. There is also the evidence of the assistant medical officer (SP9) that the deceased's hair was a bit wet when he attended to her. The fact that her hair was only a bit wet does not render SP13's evidence doubtful as it was not her evidence that the whole of the deceased's head was immersed in water. What SP13 told the court is therefore sufficient corroboration of the appellant's connection with the crime.

[90] It was next argued by counsel that the evidence of SP13 is irreconcilable with the evidence of the pathologist (SP5) that the deceased's death was not due to drowning. Counsel questioned why the prosecution called SP13 to prove drowning if drowning was not the cause of death. It was argued that the fact that water came out from the deceased's mouth and nostrils corroborates the appellant's defence that the deceased died due to drowning. The short answer to this argument is that SP5 is a forensic expert whereas SP13 is not.

[91] Whatever may be the probative value of SP13's unsworn testimony, it is important to bear in mind that the prosecution is not relying on her testimony alone to connect the appellant with the crime.

As a matter of fact SP13 did not say anything about any assault on the

deceased's chest and abdomen by the appellant. Her evidence was merely to the effect that the appellant immersed the deceased's head in a basin filled with water. Thus, even if we were to disregard SP13's evidence completely the prosecution had ample other evidence to prove that the fatal chest and abdominal injuries were caused by the appellant.

[92] With regard to the second, third and fourth grounds of appeal the crux of the argument is that there were other intervening factors that could have led to the deceased's death, including infection and the acts of SP12 and his ex-wife. It was argued that the existence of these intervening factors had the effect of negating any inference that the appellant had the required intention to commit murder. As to the first line of argument it is clear as explained earlier in this judgment that the circumstantial evidence points to the appellant as the sole culprit. The contention is therefore without merit.

[93] As for the question of intention, this is primarily a question of fact and a matter of inference. In this case the learned JC after a careful evaluation and assessment of the entire evidence found that the appellant's act of causing the 'blunt force trauma to the chest and abdomen' was done intentionally. There is nothing plainly wrong with this finding of fact as it was based on actual evidence before him. I would say that he was plainly right. This and the fact that survival from these injuries was slim according to SP5 proves the element of intention beyond any reasonable doubt. The learned JC's finding in this regard is as follows:

> [79] Jadi berdasarkan nas undang-undang yang dinyatakan di atas itu Mahkamah ini merumuskan kecederaan yang dilakukan oleh OKT menyebabkan 33 kesan lebam dan luka lelasan berpusat di bahagian kepala serta 44 kesan luka yang sama di anggota sebelah atas serta bawah badan si mati berserta kesan kecederaan parah dibahagian injap jantung (Koch's Triangle) serta bahagian hati ('liver') disahkan oleh SP5 dalam laporan bedah siasatnya (eksh P18) merupakan 'blunt force trauma to the chest and abdomen' yang amat fatal dan menyebabkan peluang hidup si mati amat tipis itu jelas sekali mempunyai kemungkinan kematian yang tinggi ('the probility of death resulting is high') sejajar dengan prinsip kes *Abdul Razak Dalek*. Ini sekali gus membuktikan OKT mempunyai niat untuk mencederakan si mati membawa kepada kematian konsisten dengan peruntukan di bawah perenggan (c) dan (d) Seksyen 300 Kanun Keseksaan.

[94] It was submitted that the learned JC failed to fairly and justly appreciate the defence case. There is no substance to the argument. First of all it is abundantly clear that the learned JC had sufficiently directed his mind to the applicable principles in dealing with the defence explanation by citing *Mohamad Radhi bin Yaakob v Public Prosecutor* [1991] 3 MLJ 169; *Public Prosecutor v Saimin & Ors* [1971] 2 MLJ 16; [1971] 1 LNS 115; *Public Prosecutor v Datuk Tan Cheng Swee & Anor* [1980] 2 MLJ 276; [1980] 1 LNS 58; *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195; and *Public Prosecutor v*

Ling Tee Huah [1982] 2 MLJ 324.

[95] Having properly directed his mind to the principles, the learned JC then proceeded to recount the appellant's defence and assessed the appellant's explanation with meticulous care. He had sufficiently dealt with the most crucial aspect of the defence case, ie the appellant's claim that she did not know what happened to the deceased as she was sleeping. The learned JC did not accept her explanation and had given valid reasons for so deciding. This court should be slow to disturb such finding. This is how the learned JC rationalised his finding:

> Lagipun sebelum ini OKT memberi alasan beliau tertidur dengan Danish Irshad ketika si mati dan Nur Dania Batrisya Binti Norafizan (SP13) mandi di dalam bilik air rumah tempat kejadian dan dalam keadaan sedemikian mana mungkin OKT mengemukakan pembelaan beliau seolah-olah sememangnya tahu si mati terjatuh di dalam baldi ketika mandi di dalam bilik air. Penjelasan OKT ini jelas tidak konsisten dengan keterangan lain keseluruhannya dan juga amat meragukan kebenarannya atau menyembunyikan apa sebenarnya berlaku antara beliau dan si mati pada hari kejadian kes kematian si mati.

[96] It was further submitted that the learned JC failed to consider inferences that the appellant could have committed other offences other than murder based on the evidence. With due respect to counsel, once the offence of murder had been established by the evidence and found proved by the learned JC there is no reason why the court should consider other offences that the appellant could have committed.

[97] To deflect culpability away from herself the appellant tried to shift the blame on SP12, alleging that he was a violent person, implying of course that it was SP12 who was responsible for the deceased's death. First of all no weight should be given to this allegation as it was never put to SP12 in cross-examination. The law on the point is as stated by Mukharji J in *AEG Carapiet v AY Derderian* AIR 1961 Cal 359 as follows:

> The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprises at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is made comes to give evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much counsel is bound to do when cross examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or which that witness had any share. If he asked no question with regard to this, then he must be taken to accept the plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when

he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

[98] Secondly, there is no possibility that it was SP12 who inflicted those fatal injuries to the deceased's chest and abdomen. He was at his work place when the deceased succumbed to those injuries between 6am and 9am on 9 January 2011 and the appellant was the only adult at home.

[99] Thirdly, the appellant herself admitted in her evidence that SP12 loves his three children, especially the deceased. There was therefore no reason for him to cause such life ending injuries to the deceased whom he loved.

[100] For all the reasons aforesaid I find that the learned JC was not wrong in finding the appellant guilty of murdering her stepdaughter as charged. In the circumstances I dismiss the appeal and uphold the conviction and sentence.

Appeal allowed; appellant acquitted and discharged.

Reported by Afiq Mohamad Noor